SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. ~~1224~~ 79

TV PIX, INC. AND WELLS TV, INC., *Appellants,*

vs.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Appellees.*

On Appeal from the United States District Court for the District of Nevada

MOTION TO DISMISS OR AFFIRM

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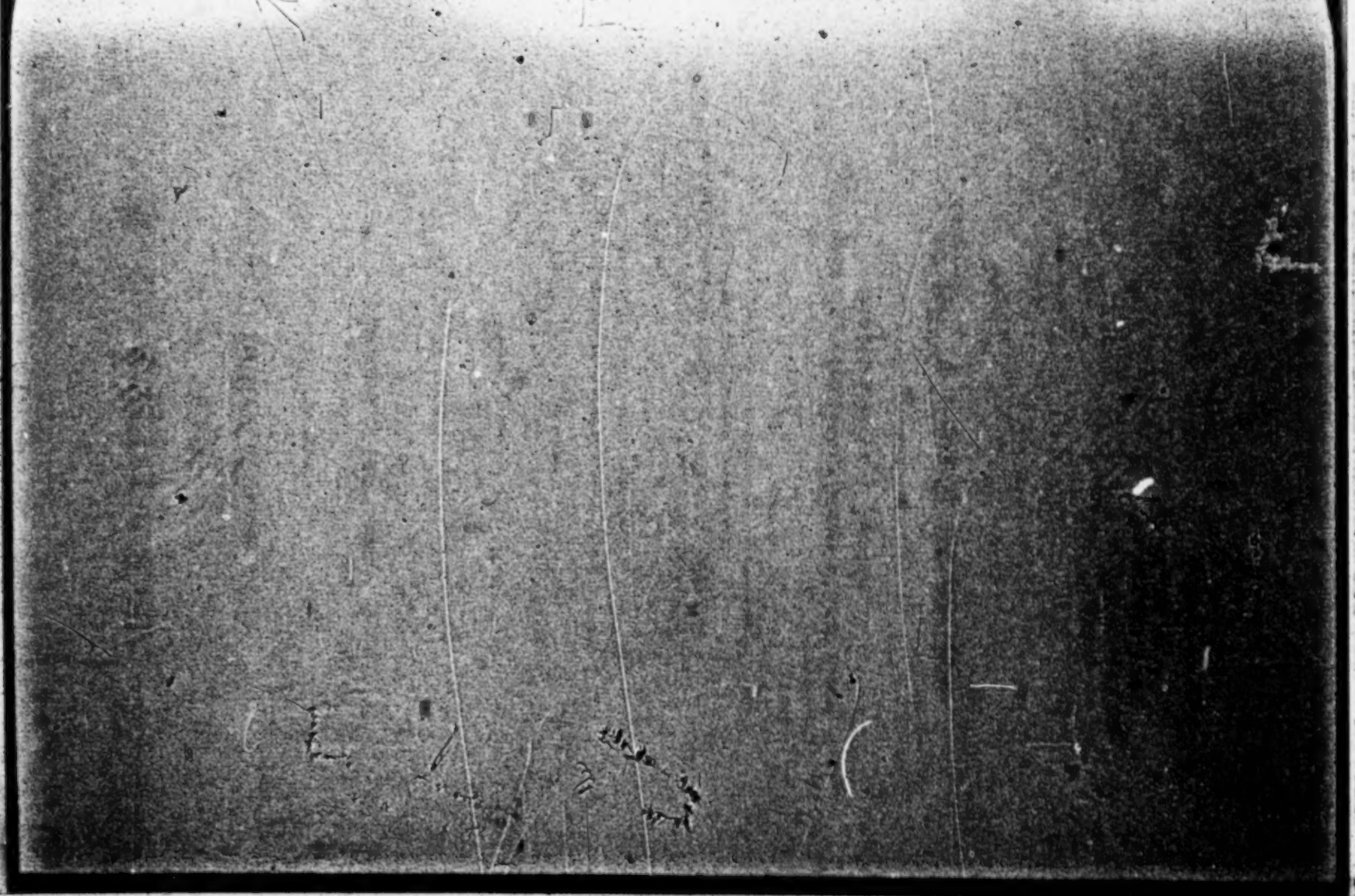

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TABLE OF CONTENTS

	PAGE
Motion to Dismiss or Affirm	5
Brief in Support of Motion to Dismiss Appeal or Affirm Judgment of Three-Judge Federal District Court	7
Statement of the Case	7
Statement of Jurisdiction	8
Question Presented	9
Authorities and Argument	9
I. The Provisions of the Fourteenth Amendment Do Not Immunize the Appellants From the Application of the Nevada Public Service Statutes	10
II. There Is No Substantial Federal or Constitutional Question Involved in This Case	14
III. Appellants Have Not Exhausted Their State Remedies, Either Administrative or Judicial	16
Conclusion	21
Exhibit "A"	22

TABLE OF CASES AND AUTHORITIES CITED

CASES

	PAGE
Acret vs Harwood, 41 Fed. Supp. 492 at 495	15
Alabama Pub. Serv. Comm. vs Southern Ry. Co., 341 U.S. 341	19
Cavanaugh vs Looney, 248 U.S. 453 at 456	16
Chicago etc. Transit Co. vs Nims, 252 Fed.2d 317	17, 21
C.I.O. vs Windsor, 146 Fed. Supp. 214	18
Cooper vs Hutchinson, (DC NJ) 88 Fed. Supp. 774	16
Dalton Adding Machine Co. vs Corp. Comm. of Mass., 236 U.S. 699	21
Dispatch, Inc. vs City of Erie, 249 Fed. Supp. 267	13
Guerra vs Philadelphia, (DC Pa.) 30 Fed. Supp. 791	17
Hawks vs Hammill, 288 U.S. 52	15
Howard vs Ladner, (DC Miss.)	18
Inter Longshoremen's Assn. vs Buttle, 101 Fed. Supp. 650	18
Patterson vs Hardin, (DC Ind.) 145 Fed. Supp. 299	17
Phillips Petroleum Co. vs Jones, (DC Okla.) 147 Fed. Supp. 122	17
Piccoli vs Bd. of Trustees et al., 87 Fed. Supp. 672	21
Texas Co. vs Montgomery, 73 Fed. Supp. 527 affirmed 322 U.S. 827	21
Watson vs Buck, 313 U.S. 387	21
Wells vs Hand, 238 Fed. Supp. 779	18
Wilder vs Reno, 43 Fed. 727	21

TEXTS

11 Am. Jur. p. 875	14
18 C.J.S., p. 88, Sec. 74	10

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On Appeal from the United States District Court for the District of Nevada

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move the Court to dismiss the appeal herein, or to affirm the judgment sought to be reviewed on the appeal on the following grounds:

1. No substantial federal question is presented by the appeal.

2. That it is manifest that the questions on which the appeal depends are so unsubstantial as not to need further argument.

3. That appellants failed to exhaust their state remedies, either administrative or judicial, before instituting the action below in the United States District Court.

4. That all the service and functions indulged in by appellants are rendered to all their subscribers within the State of Nevada, and are therefore *intrastate* commerce solely within the jurisdiction of the administrative departments and courts of this State. It follows, therefore, that the lower court was without jurisdiction to hear the cause or impanel a three-judge court.

RESPECTFULLY SUBMITTED this 15th day of May, 1967.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF THREE-JUDGE FEDERAL DISTRICT COURT

STATEMENT OF THE CASE

This matter consists of two cases, filed by two corporate plaintiffs, both of which, at all times mentioned herein, were organized and existing under the laws of the State of Nevada. The relief sought in both cases was the same. Therefore, for the sake of brevity and convenience we shall refer to the appellants as "plaintiffs" as though they were both in one action.

Beginning in 1956 the plaintiffs began the operation of community antenna television systems in the cities of Wells, Nevada and Elko, Nevada. Later a similar service was begun in Carson City, Nevada. No federal or state license or permit was ever asked for or obtained.

The function of the systems is to pick up television signals from Nevada stations and by the use of wires or cables attached to telephone poles in each city in which the system functions, transmit these signals into the homes of subscribers. The service requires a cable installation in the residence of each subscriber for which greatly varying fees have been charged.

No Nevada statute required state public utility regulation until 1963. However, after continued complaints of poor service and excessive charges, the Nevada Legislature in 1963 enacted an amendment to the Nevada Public Service Act, NRS 704.020, 1(d) which provides as follows:

> "Public utility is defined as any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

Pursuant to this statute, and because of further numerous complaints from subscribers to the system, the Nevada Public Service Commission issued its order to appellants to appear and show cause why the said commission should not order appellants to cease and desist offering a public utility service until properly authorized to do so by said commission.

Appellants ignored said order to show cause and commenced an action in the United States District Court for the District of Nevada in which a declaratory judgment was sought, and also an injunction restraining the Nevada Public Service Commission from enforcing said statute on the ground that said statute was in violation of the Interstate Commerce Clause, the Supremacy Clause and the Fourteenth Amendment of the United States Constitution.

A three-judge Federal Court was convened on motion of appellants, over appellees' opposition, under 28 U.S.C.A. 2281. A hearing was held on appellants' request for an injunction and declaratory relief, after which the three-judge court denied the requested relief and ordered the complaints dismissed. A copy of the court's decision and order is marked Exhibit "A", attached hereto and made a part hereof.

Appellants subsequently filed a "motion for a new trial" and a "motion to amend the judgment", both of which motions were denied by said three-judge court. The appellants have appealed from the order denying the requested relief and dismissing the actions.

STATEMENT OF JURISDICTION

The court has jurisdiction to hear motions to dismiss appeals or affirm the judgment of the three-judge court under Rule 7 of the Supreme Court Rules, and the Court has jurisdiction of the appeal under 28 U.S.C.A. Section 1253.

QUESTION PRESENTED

Notwithstanding the complex and numerous questions set forth on page 3 of appellants' brief filed in this Court, there is in all reality but one question to be considered. That is:

> Did the three-judge district court err when it denied appellants the relief sought and dismissed their complaint?

AUTHORITIES AND ARGUMENT

As we repeatedly stated in the lower court, neither the Congress nor the Federal Communications Commission has pre-empted or threatened to pre-empt the community antennae television field as to state certification of the service territory and as regulation of rates to subscribers and the quality of service furnished in connection therewith.

The federal and state regulatory objectives are distinct and compatible. The Federal Communications Commission seeks to regulate the television program market, while the state commissions seek only to regulate the rates, services and operating territory of community antennae television companies.

The Federal Communications Commission properly has, as a matter of course and proper regulation in the federal sphere, the authority to adopt rules for the conduct and operation of community antennae systems in order to prevent interference with television signals and programming. Further than that the commission has refused to go. As proof of this statement, we respectfully refer to rules adopted, as announced on February 15, 1966, as set forth in the commission's Second Report and Order in Dockets 14895, 15233 and 15971—FCC 66-220 issued March 8, 1966.

In paragraph numbered 9, and entitled "Legislative Proposals", subparagraph 3, the commission asked Congress to:

"(3) *provide for no Federal pre-emption except to the extent of direct conflict with the provisions of the communications act or regulations of the Commission.* The Commission also requested Congress to consider the appropriate relationship of Federal to State-local jurisdiction over CATV systems *(particularly with regard to initial franchising, rate regulation and related matters)* . . ."
(Emphasis added.)

It is interesting to note that, although appellants contend state regulation would violate their federal constitutional rights, they have not sought federal authority, but, as the record shows, have voluntarily accepted and are now operating under public utility type franchises granted by Nevada municipalities. The Nevada Public Service Commission, pursuant to a legislative mandate, seeks only to prevent an uneconomic duplication of facilities and to protect the public from exorbitant rates and substandard degraded service by proper regulation as is done with every other public utility in Nevada.

I.

The Provisions of the Fourteenth Amendment Do Not Immunize the Appellants From the Application of the Nevada Public Service Statutes

Appellants contend that the Nevada regulatory program offends the guarantees of the Fourteenth Amendment. This is clearly erroneous. For example, in *86 C.J.S.*, page 88, Sec. 74, it is stated:

"Because of the quasi-public nature of the business, like every other public utility, . . . one engaged in the business of furnishing telegraph or telephone service to the public, or any other business involving the transmission of intelligence by electricity as ticker or market quotation service,

> electric burglar or fire alarm service, . . . or wireless telegraph service or radio broadcasting, . . . is subject to control and regulation by public authority for the common good, not only as to the public safety, security, and convenience, but also as to charges and discriminations . . ."

The CATV systems are endowed with the monopolistic characteristics of other utilities because of their cable distribution facilities which are similar to those of electric and telephone companies. These distribution facilities require the use of the public streets and highways. It is not economically feasible for CATV companies to construct two or more distribution systems over the same streets. In instances where a single unregulated CATV company serves the public, it is free to "charge what the traffic will bear."

The posture of the appellants in challenging the state regulatory program is inconsistent with their voluntary assumption of obligations imposed by the Carson City, Elko and Wells franchises and the utility pole attachment agreements.

The public utility type franchises granted by the Nevada municipalities, authorizing the use of the streets within a certain territory, are analogous to the certificates of public convenience and necessity specified by state law.

The construction and operation standards prescribed by the franchises and pole attachment agreements are analogous to the service and safety requirements of state law.

The gross receipts payments prescribed by the franchises are similar to the annual assessments required by state law.

The financial disclosure requirements of the franchises are analogous to the annual reports prescribed by state law.

In addition, the franchises and pole attachment agreements have imposed various surety and indemnification obligations upon the plaintiffs.

In essence, many of the obligations imposed by the state regulatory program have already been voluntarily assumed by the plaintiffs. However, there is one significant difference—the plaintiffs have not yet been placed under effective rate regulation. The plaintiffs are now free to earn in excess of a reasonable rate of return. We do not blame them for wanting to continue to do so.

But, the people of Nevada, through their legislative representatives, have decided that lack of effective regulation is adverse to the public interest. We believe this decision is reasonable.

Otherwise, the CATV companies could operate their distribution systems in the public streets and at the same time charge exorbitant rates to members of the public, render degraded service and discriminate against individuals on an arbitrary basis.

Another indication of the "no pre-emption" construction is found in FCC's statement to subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on May 28, 1965 regarding H.R. 7715 which was entitled "A bill to amend the Communications Act of 1934 to establish a national television policy and to provide a method by which rules of the Federal Communications Commission with regard to community antennae television systems may be reviewed by the Congress before they become effective."

The FCC, speaking through its then Chairman, E. William Henry, criticized Section 398 of H.R. 7715 in the following terms:

> "Section 398 states that 'it is necessary for the Federal Government to regulate those aspects of intrastate and local television communications which may affect the accomplishment of the purpose of this part and that such regulation should be the exclusive concern of the Federal Government.' Since the purpose is stated so broadly—to make available TV programs as widely as possible—it could be argued that

the entire field is pre-empted. *The Commission does not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises.* These are all matters which we believe are better left to regulation on the state or local level. If section 398 is intended to pre-empt or looks toward pre-emption which would oust the local entities from regulation of such matters, we believe that its enactment would be inadvisable. For in that event, neither the Commission, in view of the amendment to subsection (h) specifying that a CATV system shall not be deemed a common carrier, nor any other body would have authority over the CATV system's rates or extension of service. *These important aspects of the public interest would simply be left unprotected.* We think, therefore, that the bill or its legislative history should make clear that neither section 398 nor the amendment to subsection (h) would oust the state or local authorities of jurisdiction over such matters as rates or extensions of service." (Emphasis supplied.)

In the case of *Dispatch, Inc. vs City of Erie*, 249 Fed. Supp. 267, a summary judgment was subsequently vacated by the circuit court on the ground that the pleadings did not permit a summary judgment. There, as in the instant case, the plaintiff contended that the Federal Government had pre-empted the field, and that CATV was in the exclusive federal domain by specific pre-emption. The court flatly rejected that contention in the following language:

"Thus it is clear that there is no issue of any substance whatsoever in the allegation that the federal government has pre-empted this field. In fact, the Federal Communications Commission has from time to time said that it has not and will not occupy the field of CATV."

A little later in the decision quoted from the testimony of the

FCC Chairman in opposition to a house bill to extend the commission's jurisdiction to community systems is the following:

"*The commission does not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises.*" (Emphasis added.)

In the Erie case, the plaintiff also contended that the revenue proposed in the ordinance constituted an unconstitutional burden upon interstate commerce. The court answered this contention as follows:

"In the opinion of the court this proposition is without merit. * * * Interstate commerce is not involved in or with the ordinance. It does not infringe upon the interstate communications or commerce. * * * It is not a burden upon a television signal or any item passing in interstate commerce."

II.

There Is No Substantial Federal or Constitutional Question Involved In This Case

Appellants' operation is purely *intrastate*. Although the television programs viewed by appellants' subscribers have interstate status while being transmitted, the interstate journey has ended when the program is received by appellants' antennae; appellants do not rebroadcast such programs, but such programs merely flow through their cables to the television sets of their subscribers, all of whom are in the State of Nevada. This is similar to packaged merchandise shipped in interstate commerce to its destination where the original package is broken and the merchandise delivered to intrastate customers.

In 11 Am. Jur. at page 875, it is stated:

"Where the subject matter upon which the power is to be exercised is local and limited in its nature or sphere of

operation, the rule is well established that the several states may prescribe regulations until Congress intervenes."

As to the requirement of a substantial federal question, the court in *Acret vs Harwood*, 41 Fed. Supp. 492, at 495, in answer to a request for a three-judge court, said:

"The procedure which calls for the intervention of a three-judge court is extraordinary. It should not be invoked unless there is a substantial constitutional question. Jamesor & Co. v. Morgenthau, 1939, 307 U.S. 171, 172, 59 S.Ct. 804, 83 L.Ed. 1189. The right of the judge to whom the request is addressed, to deny it, when satisfied that the challenge to constitutional validity is unsubstantial, has been recognized by the highest courts, both under this statute and under the older statute, 28 U.S.C.A. § 380, which confined the action of such courts to cases seeking to restrain action under state law. See Ex parte Poresky, 1933, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152; California Water Service Co. v. Redding, 1938, 304 US 252, 58 S.Ct. 865, 82 L.Ed. 1323; Ex parte Bransford, 1940, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249; and see my opinion in Wylie v. State Board of Equalization, D.C. Cal. 1937, 21 F. Supp. 604; Rok v. Legg, D.C. Cal., 1939, 27 F. Supp. 243."

So also in *Hawks vs Hamill*, 288 U.S. 52, although the court was not concerned with the right to have a three-judge court convened, it was concerned with enjoining state officials from performing their official duties. In discussing the issue, the court said:

"Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to be issued 'unless in a case reasonably free from doubt.' Massachusetts State Grange v. Benton, 272 U.S. 525, 527. The rule has been characterized as an 'important one', to

be 'very strictly observed.' 272 U.S. at 527, 529. Compare Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159; Cavanaugh v. Looney, 248 U.S. 453, 456."

So also in *Cavanaugh vs Looney*, 248 U.S. 453 at 456, a state statute was challenged as unconstitutional upon both federal and state grounds. A special court, assembled as provided by Sec. 266 Judicial Code, denied the injunction and the appeal to the U.S. Supreme Court followed. In affirming the lower court, the Supreme Court at page 456 said:

"But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. Ex parte Young, supra, 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable."

III.

Appellants Have Not Exhausted Their State Remedies, Either Administrative or Judicial

In *Cooper vs Hutchinson* (DC NJ), 88 Fed. Supp. 774, it was held that federal courts will abstain from using power to issue injunctions where there has been an allegation that a state statute is in conflict with the Federal Constitution or that a state officer is about to administer, or is administering a state statute, in an unconstitutional manner *until the highest court of the state has first passed upon the merits of the alleged constitutionality.*

In the last cited case, the court at page 782 of 88 Fed. Supp., stated the Rule of Federal Abstention as follows:

"The doctrine of abstention has been similarly applied where there has been an allegation that a state statute is in conflict with the United States Constitution or that a state officer is about to administer, or is administering, a state

statute in an unconstitutional manner. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1724; C.I.O. v. McAdory, 325 U.S. 472, 65 S.Ct. 1395, 89 L.Ed. 1741; A. F. of L. v. Watson, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873; Traffic Telephone Worker's Federation of N.J. v. Driscoll, D.C., 72 F. Supp. 499, appeal dismissed 332 U.S. 833, 68 S.Ct. 221, 92 L.Ed. 406. Cf. Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782. The reasoning in these cases has been based upon the premise that the highest court of the state should be permitted first to limit or pass upon the merits of the alleged unconstitutionality with recourse to the United States Supreme Court if the proper federal grounds are presented. Cf. Society of Good Neighbors v. Groat, D.C., 77 F. Supp. 695."

See also *Guerra vs Philadelphia* (DC Pa.), 30 Fed. Supp. 791.

In *Chicago Transit Co. vs Nims* (CA Mich.) 252 F.2d 317, it was held that if state courts had not authoritatively construed a state statute, a federal court ought not to pass on the question of constitutionality on basis of preliminary guesses "regarding the local law."

In *Phillips Petroleum Co. vs Jones* (DC Okl.) 147 Fed. Supp. 122, it was held that if the state statute is susceptible of construction which will avoid constitutional infringement, it is the compelling duty of the federal district court to accord to the state statute that construction, at least until the state courts have spoken.

In *Patterson vs Hardin* (DC Ind.), 145 Fed. Supp. 299, it was held that a federal district court had no jurisdiction to convene a three-judge district court or submit for issue and trial to the regular district court an action to enjoin enforcement of a state zoning statute based upon the contention that the Supreme Court of Indiana wrongly decided or misconstrued a section of such

statute, since the power to construe the state statute vested finally in the state court.

A holding that is especially in point in the instant case is found in *Howard vs Ladner* (DC Miss.). There the court held that federal courts will not assume, in advance of a decision by the state court of last resort, that the state court will place such a construction upon a statute as will render it obnoxious to the Federal Constitution. *Inter Longshoreman's Assn. vs Buttle*, 101 Fed. Supp. 650; *Wells vs Hand*, 238 Fed. Supp. 779; *C.I.O. vs Windsor*, 146 Fed. Supp. 214.

In the instant case, the appellants have two available state remedies, one administrative, the other judicial. Appellants allege that the Nevada Public Service Commission intends to and will require them to conform to the state statute herein challenged. This will most probably be by way of an order to show cause before said commission why appellants shouldn't comply with said statute. At that time, appellants may present all the contentions they are attempting to present to this Court. No one may assume that the commission will make an erroneous decision. For NRS 52.070, subsection 15 provides that there is a presumption: "That official duty has been regularly performed."

In the event that the Public Service Commission should decide adversely to appellants' contentions, appellants, by reason of the provisions of NRS 704.540, are accorded ample provision for a judicial review of the adverse action by the commission; and NRS 704.550 grants the appellants the right to enjoin the commission's decision and order pendente lite. Also, NRS 704.580 gives appellants the right to appeal to the Nevada Supreme Court, should the district court's decision be adverse.

Thus it is patently clear that appellants' allegation in paragraph 11 of their complaint that: "Plaintiff has no adequate legal

remedy," like most all of their allegations, is clearly erroneous and not in accord with the law or facts.

In *Alabama Pub. Serv. Comm. vs Southern Ry. Co.*, 341 U.S. 341, a three-judge federal district court had enjoined the enforcement of an order of the Alabama Public Service Commission. The commission appealed to the U.S. Supreme Court, and that Court reversed the district court on the ground that the railway company had failed to exhaust its state remedies, both administrative and judicial. In reversing, the Court, inter alia, said (p. 348):

> "Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the commission to the circuit court of Montgomery County as a matter of right. Ala. Code 1940, Title 48, § 79. That court, after a hearing on the record certified by the commission, is empowered to set aside any commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court, id. § 90. Statutory appeal from an order of the commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.' Avery Freight Lines, Inc. v. White, 245 Ala. 618, 622–623; 18 So.2d 394, 398 (1944). The supreme court of Alabama has held that it will review an order of the commission as if appealed directly to it. Alabama Public Service Commission v. Nunis, 252 Ala. 30, 34, 39 So.2d 409, 412 (1949), and that judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted. Alabama Public Service Commission v. Southern Bell Tel. & Tel. Co., 253 Ala. 1, 11–12, 42 So.2d 635, 662 (1949).
>
> "The fact that review in the Alabama courts is limited to

the record taken before the commission presents no constitutional infirmity. Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U.S. 510 (1912). And, whatever the scope of review of commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. New York v. United States, 331 U.S. 284, 334–336 (1947); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 576 (1941). Appellee complains of irreparable injury resulting from the commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a commission order pending appeal. Ala. Code, 1940, Tit. 48, § 81, 84. Appellee has not shown that the Alabama procedure for review of commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

"An adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 577 (1941); Railroad Commission of Texas v. Rowan &

Nichols Oil Co., 310 U.S. 573, as amended, 311 U.S. 614, 615 (1940)."

It is interesting to note that in the Alabama act on an appeal to the courts, the appellant was confined to the record; whereas, in Nevada the appeal is virtually a trial de novo. (NRS 704:-560).

In the instant case, the record shows that appellants have sought no relief by way of state remedies, either administrative or judicial.

It is most important to note that the appellants allege only that appellees only "*threaten*" to impose the state law upon appellants. A mere threat or danger that a state law alleged to be unconstitutional *may be* invoked is not sufficient to give a three-judge court jurisdiction.

Watson vs Buck, 313 U.S. 387;
Dalton Adding Mach. Co. vs Corp. Comm. of Mass., 236 U.S. 699;
Piccoli vs Bd. of Trustees et al, 87 Fed. Supp. 672;
Wilder vs Reno, 43 Fed. 727;
Chicago etc. Transit Co. vs Nims, 252 Fed.2d 317;
Texas Co. vs Montgomery, 73 Fed. Supp. 527, affirmed 322 U.S. 827.

CONCLUSION

It seems patently clear from all the foregoing that the questions involved in this appeal are so unsubstantial as not to require or need any further argument. Further in this connection, the decisions of this Honorable Court sustain appellees' right to an affirmance or a dismissal.

RESPECTFULLY SUBMITTED this 15th day of May, 1967.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Appellees.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

No. 1814

TV PIX, INC., *Plaintiff*, vs. J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Defendants*.

No. 1827

WELLS TV, INC., A CORPORATION, *Plaintiff*, vs. J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Defendants*.

Before MERRILL, Circuit Judge, and FOLEY and THOMPSON, District Judges

Per Curiam:

Plaintiff in No. 1814 (TV PIX, INC.) is a corporation organized under the laws of the State of Nevada. It owns and operates community antenna systems in Elko, Carson City and Stateline, Nevada. Plaintiff in No. 1827 (Wells TV, Inc.) is also a corporation organized under the Nevada statutes which owns and operates a community antenna system in Wells, Nevada.

The Complaint in No. 1814, filed on March 24, 1966, invoked jurisdiction of this Court under 28 U.S.C. 1331, 2281 and 2284. It alleges that the defendants, Commissioners of the Public Service Commission of the State of Nevada, have interpreted Chapter 704 of the Nevada Revised Statutes to authorize regulation of community antenna systems as public utilities. The plaintiff contends any such regulation would contravene the due process clause of the Fourteenth Amendment and the Commerce Clause of the Constitution and that the Federal Government has pre-empted the states in the regulation of such operations. The Complaint seeks a preliminary and final injunction prohibiting the defendants from investigating, taking jurisdiction, or imposing any regulation pursuant to Chapter 704 of the Nevada Revised Statutes.

On April 19, 1966, the Nevada Public Service Commission issued an order to TV Pix, Inc. to appear and show cause why its operation in Elko should not be declared within the purview of N.R.S. 704.020 as a "public utility", thereby requiring a certificate of public convenience and necessity under N.R.S. 704.330(1). Similar orders

were directed to TV Pix, Inc. on April 20, 1966, concerning its operation in Carson City and Stateline. On the latter date, an order was also directed to Wells TV, Inc. to show cause why its operations should not be similarly regulated.

The Complaint in No. 1827 was filed on May 10, 1966, alleging the same grounds for relief as that in No. 1814. A temporary restraining order was then issued on May 10, 1966.

This three-judge court was impaneled, and on September 30, 1966, heard motions for a preliminary injunction and for dismissal.

Although the jurisdiction of a federal court may have been properly invoked, the Courts often abstain from its exercise. Perhaps to create order out of chaos, the commentators have classified the abstention cases into two broad categories. Cf. 1 Barron & Holtzoff, Wright, Ed., Section 64. On the one hand, we have the *Pullman* type cases wherein state action is being challenged in the federal court as contrary to the federal constitution, and there are unsettled questions of state law which may be dispositive of the case. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496. On the other hand, we have the *Burford* type cases wherein the federal court refrains from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. *Burford* v. *Sun Oil Co.*, 319 U.S. 315. The present actions present problems in both areas of abstention.

In *Pullman*, the company sought to enjoin enforcement of an order of the Texas Commission. In addition to the federal constitutional issue raised, there was an unsettled question under state law of whether the Commission had the power to make its order. Although the district court had jurisdiction of the suit, the Supreme Court held it should have remanded the case to the state court for a determination of the state issues. The rationale of *Pullman* is to avoid a premature determination of a federal constitutional issue which may not survive state litigation. So long as there is adequate state review to decide the state issue, the federal court should abstain. See *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168; *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167; *Green* v. *Phillips Petroleum*, 119 F.2d. 466.

Here, as in *Pullman*, "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Pullman*, supra, at 500. The defendants are attempting to bring the plaintiffs within the language of N.R.S. 704.020 which defines a public utility as "Any plant, property or facility furnishing facilities to the public for the transmission

of intelligence via electricity. *The provisions of this paragraph do not apply to interstate commerce.*" [Emphasis added.] N.R.S. § 704.-020(d).

The plaintiffs attack the interpretation on federal constitutional grounds. There are, however, many state questions to be resolved. If the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached. *Bonanza Air Lines, Inc. v. Public Service Comm. of Nevada*, 1960, 186 F. Supp. 674.

There is an adequate procedure in the state courts to have these questions decided. If the defendants determine that the plaintiffs are within the purview of N.R.S. 704.020(d), they will then issue an order requiring the plaintiffs to cease and desist operations until a certificate of public convenience and necessity is issued. N.R.S. 704.330(4). The plaintiffs may then bring an action in the state district court to have the order of the Commission vacated or set aside. N.R.S. 704.540. An appeal is available from a decision in the state district court to the Supreme Court of the State of Nevada. N.R.S. 704.580. Since it is possible that the interpretation given by the state courts may be dispositive of the case, this Court will abstain from exercising jurisdiction.

The federal courts will also adopt a hands-off policy when the problem involves the administration by the state of its own affairs. Where state administrative action is challenged, the federal court will normally not intervene when there is an adequate state review procedure for the protection of federal rights. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341. The Courts will not meddle in a state's administrative affairs. See also: *Audio casting, Inc. v. State of Louisiana*, 143 F. Supp. 922.

Particularly persuasive is *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237. In that case, the respondent sued the Commission in the Federal District Court. The company sought (1) a declaratory judgment that its activities were in interstate commerce, and (2) an injunction against the Commission interfering with its activities. At the time of the suit, there was no decision of the Commission to interfere with the company's activities. The company merely alleged a threat of such action. The Supreme Court ordered dismissal in the following language:

"Even where there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to pre-empt and

pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce, in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Eccles v. Peoples Bank, 333 U.S. 426. See Colegrove v. Green, 328 U.S. 549. Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.

"But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

"Declaratory proceedings in the federal courts against state officials must be decided with regard for implications of our federal system. *State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact.* It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. Alabama State Federation of Labor v. McAdory, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." [Emphasis added.] *Wycoff*, supra, at 246, 247.

In the cause before this Court, there has been no decision by the defendants to regulate the plaintiffs. The only action of the Commission is an order to show cause why the plaintiffs should not be regulated, i.e., the Commission has simply ordered a hearing. To reach the federal question involved, we would have to assume that the State has chosen to regulate. In substance, the plaintiff is asking this Court to enjoin the State from making a final choice. We think that such meddling in the administrative affairs of the State of Nevada would

be a clear violation of the *Burford* doctrine. There is sufficient state judicial review available from any order the Commission may make. Cf. N.R.S. 704.540, 704.580, supra.

The motions for preliminary injunction are denied and the actions are dismissed.

/s/ CHARLES M. MERRILL
Circuit Judge

/s/ ROGER D. FOLEY
District Judge

/s/ BRUCE R. THOMPSON
District Judge